Appeals Decision

Site visit made on 21 December 2016

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 16 February 2017

Appeal Refs: APP/X5990/C/16/3151060, 3151061 and 3151062
20 Moxon Street, London W1U 4EU

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Laurent Faure of Bubbles and Wine Limited, Le Vieux Comptoir and The Company Secretary, Bubbles and Wine Limited against an enforcement notice issued by City of Westminster Council.
- The enforcement notice was issued on 21 April 2016.
- The breach of planning control as alleged in the notice is without the requisite planning permission and within the last 10 years, the unauthorised change of use of 20 Moxon Street from use for Class B1 (Business) purposes to use for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant and wine bar.
- The requirements of the notice are:
  (a) The use of the Property for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant and wine bar ("the Unauthorised Use") shall cease, and;
  (b) All equipment, fixtures, fittings and furniture brought onto the premises for the purpose of carrying on the Unauthorised Use cited in Part (a) above, shall be removed from the Property.
- The period for compliance with the requirements is three months after this notice takes effect.
- The appeals are proceeding on the grounds set out in section 174(2)(b) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision

1. The appeals succeed in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

The appeals on ground (b)

2. The issue under ground (b) is whether or not the breach of planning control alleged in the enforcement notice has occurred as a matter of fact. Ground (b) is one of the "legal" grounds of appeal. Consequently, the burden of proof is on the appellants to make out the case that the alleged change of use of the premises to the mixed use specified in the Notice has not occurred.

3. The appeal premises comprise part of the ground floor and basement of a building to the north of Moxon Street at the junction with Ashland Place. There are discrepancies in the address given for these premises but they appear to be known as 20 Moxon Street. The rest of the ground floor of the building has a residential use outside the scope of the notice. The Council contends that the existing lawful use of the appeal premises is for Class B1 (Business) purposes and that there has been a material change of use to a mixed use comprising three distinct primary uses, namely a retail shop, a restaurant and a wine bar.

Whether the planning permission for retail use has been implemented

4. Planning permission was granted to use the premises for Class A1 (retail) purposes on 12 June 2012, Ref 12/03567/FULL, however the Council says that it expired, unimplemented. It relies on a letter dated 31 March 2016 in which the appellants' agents state that the premises were being used as a 'mixed use retail/restaurant' which began on 1 December 2012. The enforcement officer's report states that following the 2012 permission the property was occupied by Le Vieux Comptoir, trading as a mixture of retail shop, restaurant and wine bar. However it appears from the report that it was not until after 31 December 2013 that inspections of the property revealed that it was in use for mixed use purposes as "a retail shop, restaurant and wine bar".

5. The Council advised the appellants by letter in January 2014 that the use should revert to its "lawful A1 retail use", however it now considers that advice to be inaccurate. As far as I can see from the information supplied, that view is based on the agent's later letter rather than any contemporaneous inspection around the date when the premises opened in December 2012. Furthermore another letter was sent to the appellants in February 2014 which lays a heavy emphasis on the need to comply with the conditions of the 2012 permission.

6. According to the appellants' statement the ground floor was in use for Class A1 purposes on 23 December 2012 prior to the commencement of the use of the basement which began on 15 May 2013. They also state that between these dates only the ground floor of the retail unit was exploited as a wines and spirits shop whilst important building and decorative works were performed to design the basement. When the first premises licence was obtained in November 2012, the licensing committee recorded that the appellant wished to operate as a retail shop/delicatessen/café providing on and off sales of alcohol on the ground and lower ground floor levels. Promotional literature reflects that the appellants' "goal was to open a wine shop…and not only a wine shop and a wine cellar but also a grocery, a deli, cheese coffee and tea counter."

7. I recognise that there are contradictory statements made by or on behalf of the appellants as to their intentions and the status of the 2012 permission. Whether a planning permission has been implemented under s56 of the Act is however an objective test and the intention of the developer is not relevant. The assessment requires a fact and degree approach as to whether what was done was in accordance with the relevant planning permission and whether it was material in the sense of not being *de minimis*.

8. The Council has not provided evidence of its own to contradict or otherwise make the appellants' version of events less than probable, and the appeal statement is sufficiently unambiguous to persuade me on the balance of probabilities that a separate retail use of the appeal site was commenced in or around December 2012 and that the café/restaurant use did not emerge as a significantly material use in its own right until after the premises were refurbished in or around May 2013.

9. The appellants appear to suggest that the retail use of the ground floor has formed a separate planning unit, however I reject that stance as there is a significant functional linkage between the two floors by use of the common stairway and lifts as well as the fact that they are in common ownership and occupation. In any event it is likely that part of the lower ground floor was used for purposes ancillary to the retail use of the ground floor shop when it

opened, if only for storage and the like, although the evidence would suggest that part of the basement was also used for display of wines, delicatessen items and occasional wine tastings. Taken as a whole, the initial change to a retail use would have been material over a significant part of the appeal premises.[1]

10. By s56 of the Act once material development has been carried out the whole of a planning permission of which it formed part is saved from the normal expiry provisions. Consequently the enforcement notice should be corrected to allege a material change of use from Class A1 retail purposes. Such a correction is possible without causing prejudice to the parties as it reflects the true position regarding the planning status of the premises.

Current use

11. The appellants claim that there is no wine bar in operation. They state that there is a "deli/coffee" in the lower ground floor and draw attention to the premises licence that requires any alcohol to be consumed on the premises to be served with food. It is also suggested that the mixed use alleged is "more related to the space and the comfort allowed to customers, than the cooking on site" and that cooking operations are carried on with an electrical cooking unit without any gas or fryers.

12. When I visited at lunch time the ground floor appeared exclusively given over to the retail sale of wines and spirits displayed on shelves surrounding a counter. A lift and open stairs descended to the basement level where an open plan arrangement included several table covers, approximately 25 to 30, at which customers were eating substantial meals and drinking. I would describe the lower ground floor use as a French style bistro. Staff were preparing hot food in a kitchen area. Other areas were set out for display and preparation of breads and other foods, there was a bar and an area for wine tasting events with a table surrounded by wall-to-ceiling shelves containing wines. Licensing records indicate such events have been held in the basement during 2013 to 2015. The current use of the appeal premises clearly includes a primary use as a Class A3 restaurant. To the rear of the basement there were toilets, offices and store rooms which have an ancillary function to the primary uses.

Whether there is a separate wine bar use

13. The bar is to the rear of one of the seating areas, with four or five bar stools, all unoccupied during my visit. It is discretely placed away from the entrance stairs and lift and one would have to access it through a seated area. Save for pre-booked wine tasting events, the premises licence requires on-sales of alcohol to be "ancillary to the consumption of substantial food and restricted to the basement area". Licence conditions are not of course evidence that no breach of them ever takes place. However I also read that if no seating is immediately available customers are invited to sit in the holding bar to wait for seating to become available. The Council inspected in 2014 and was told that a service charge was payable to purchase wine to consume on the premises. It is likely that this refers to what is commonly known as "corkage" whereby customers pay a small fee to bring their own wine (or, as I happened to see

[1] The 2012 permission contains no genuine pre-commencement conditions. Condition 3 requires waste storage to be provided outside the premises "before anyone moves into the property", however the Council does not dispute that this has been done.

during my site visit, to purchase it from the ground floor retail facility) to consume with the meal.

14. Use as a public house, wine-bar or other drinking establishment falls within Class A4 of the Town and Country Planning (Use Classes) Order 1987 as amended. The bar occupies a small area of the appeal premises and there is insufficient evidence of its separate primary use as a wine bar. It is rather ancillary to the dining function. The wine tasting events appear to be ancillary to the retail use of the premises, as may be expected in a specialist wine shop from time to time. Wine tasting "classes" are also held but as with the tasting events, the number held per year is relatively few and currently insufficient in my view to amount to an independent primary use as a drinking establishment.

15. Therefore the enforcement notice should be further corrected to delete reference to the wine bar because it is not a primary use. No injustice to the Council would result in making this correction, having had due regard to the Council's evidence on the point, since it would reflect what I have found to be the primary unauthorised uses at the appeal site.

Conclusion on ground (b) appeals

16. The ground (b) appeals succeed in relation to the alleged existing lawful use of the land and the alleged primary use of the premises as a wine bar. Errors in the description of the breach of planning control can be the subject of an appeal on ground (b), but do not necessarily defeat the notice, given the power of correction which I propose to exercise under s176(1)(a) of the Act.

The appeals on ground (f)

17. The issue under this ground is whether the steps required by the notice exceed what is necessary to remedy the breach of planning control, or, as the case may be, to remedy any injury to amenity caused by the development. The notice indicates that its aim is to remedy the breach of planning control in accordance with s173(4)(a) of the Act.

18. The use of the site remains unauthorised as a mixed use for the primary retail and restaurant uses, together with ancillary activities. The requirement to cease the mixed use does not bear on the retail use and ancillary activities directly associated with it, but only the unlawful component of the mixed use, namely the A3 restaurant use for the sale of food and drink for consumption on the premises.

19. However in Requirement (b) the phrase "Unauthorised Use" does not allow for the equipment, fixtures, fittings and furniture associated with the acceptable component, namely the permitted primary retail use of the mixed use, to remain. Therefore the requirement is excessive and the phrase needs to be varied to specifically state "restaurant use". The appeals on ground (f) succeed to this extent only.

Conclusion

20. For the reasons given above I conclude that the existing lawful use of the premises is Class A (retail) and the alleged primary use as a wine bar does not exist. Further Requirement (b) in the enforcement notice is excessive. I am correcting and varying the notice accordingly, prior to upholding it. The appeals under grounds (b) and (f) succeed to that extent.

Formal decision

21. The appeals are allowed on grounds (b) and (f) and it is directed that the allegation of breach of planning control in the enforcement notice be corrected as follows:

- Delete "B1 (Business)" and replace with "A1 (Retail)"
- Delete ", restaurant and wine bar." and replace with "and restaurant."

22. It is further directed that the requirements of the notice be varied as follows:

- Requirement (a): Delete ", restaurant and wine bar" and replace with "and restaurant"
- Requirement (b): Delete "Unauthorised Use" and replace with "restaurant use"

23. Subject to these corrections and variations the enforcement notice is upheld.

Grahame Kean

INSPECTOR